understood. The first of these cases went upon the ground that the chancery jurisdiction conferred upon the courts of the Territories by the organic act was beyond the reach of Territorial legislation; and the second, in which the Territorial Court of Appeals was called a court of the United States, was only intended to distinguish it from a State court.

Upon the whole, we are of opinion that the jury in this case was not selected and summoned in conformity with law, and that the challenge to the array should have been allowed. This opinion makes it unnecessary to consider the other questions in the case.

JUDGMENT REVERSED.

UNITED STATES v. VIGIL.

The Departmental Assemblies had no power under the laws of Mexico regulating the disposition of the public domain, to give it away, either with or without the assent of the governor, except for the purposes of settlement or cultivation. The right to dispose of it for other purposes rested with the supreme government alone.

Held, accordingly, that a grant by a Departmental Assembly of a tract of land embracing an area of over two millions of acres, the grantees binding themselves to construct two wells for the relief and aid of travellers, and to establish two factories for the use of the State, and to protect them from hostile invasion, was void, whether such grant were approved by the governor or not.

APPEAL from the Supreme Court of the Territory of New Mexico; the case being thus:

On the 28th of December, 1845, one Vigil and certain other persons addressed a petition to the Most Excellent Departmental Assembly, through Armijo, governor of New Mexico, asking for a grant of a tract of land called the *Jornada del Muerto*, binding themselves, if the grant were made, to construct two wells for the relief and aid of travellers, and establish two factories for the use of the State, and to protect them from hostile invasion. The governor transmitted

the petition to the Assembly, but declined to recommend that favorable action should be taken upon it, on account of the novel character of the application. Notwithstanding the refusal of the governor to recommend favorable action, the Assembly, on the 10th of January, 1846, granted the tract to the petitioners for the purpose of constructing wells and cultivating the lands, so far as their means would permit, without being entitled to an exclusive right to the pasture. The tract disposed of in this way, embraced an area of *over two millions of acres.* Soon after this, as is known, war broke out between the United States and Mexico; and the whole region where the land lay passed by conquest and treaty to the government of our own country. Hereupon Vigil and the other parties, asserting title under the grant, presented their claim to the surveyor-general of New Mexico for confirmation. He, however, rejected it. The claimants then applied to Congress for relief, and a law was passed for their benefit, which authorized them to institute a suit in the Supreme Court of the Territory of New Mexico against the United States; the law declaring further that the same principles should be applied to the determination of the controversy, which Congress had prescribed for the decision of similar land claims in California, derived under the authority of the Mexican government. Suit was accordingly brought in the court mentioned—the court below—and that court confirmed the claim. From the decree of confirmation the case was now here on appeal by the United States.

The case was ably and elaborately argued, and a wide range taken in the discussion of questions presented by the record, but collateral to the history already given, which it is not necessary to notice in view of the grounds hereinafter set forth, on which the decision of this court is rested.

Mr. J. A. Wills and Mr. B. H. Bristow, Solicitor-General, for the United States; Mr. J. S. Watts and T. Ewing, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It has been repeatedly decided by this court, that the only

laws in force in the Territories of Mexico for the disposition of the public lands, with the exception of those relating to missions and towns, are the act of the Mexican Congress of 1824, and the regulations of 1828. The avowed purpose of the Congress in enacting this law, and of the supreme government in carrying it into effect, was to colonize the public domain; to preserve it for settlement or cultivation. The favor of the legislature has, doubtless, been often abused by unworthy ministers in charge of the remote Territories, but this consideration in no wise detracts from the wisdom of the policy on this subject. This policy recognized the obligation resting on the government to hold the public lands as a public trust, to be administered for the benefit of those who would settle upon them or cultivate them. They could not be sold for money, nor granted away in consideration of past public services, nor on condition of making public improvements, of use to the travelling community, or of general benefit to the state. The power to cede them depended entirely on the uses to which they were to be put, and these, as we have seen, were cultivation or settlement. The legal right to dispose of them for other objects, was withdrawn from the local authorities, and rested alone with the supreme government.

If the policy of the law were wise, so were the regulations established for the purpose of carrying out its provisions. These regulations conferred on the governors of the Territories, "the political chiefs," as they are called, the authority to grant vacant lands, and did not delegate it to the Departmental Assembly. It is true the grant was not complete until the approval of the Assembly, and in this sense the Assembly and governor acted concurrently, but the initiative must be taken by the governor. He was required to act in the first instance—to decide whether the petitioner was a fit person to receive the grant, and whether the land itself could be granted without prejudice to the public or individuals. In case the information was satisfactory on these points, he was authorized to make the grant, and at the proper time to lay it before the Assembly, who were

required to give or withhold their consent. They were in this respect an advisory body to the governor, and sustained the same relation to him, that the Senate of the United States does to the President in the matter of appointments and treaties. The Mexican government chose to intrust to an officer appointed by it, the execution of its policy on the subject of the public domain, rather than to an elective assembly, over whose conduct it could not in the nature of things exercise the same supervision and control. It would seem, owing to the remoteness of the Territories from the seat of the General government, and the sparseness of the population, that the wisdom of the selection could not be disputed, but be this as it may, it was the undoubted right of the Mexican government to decide the question for itself, and this court cannot be required to go further than to give effect to that decision.

These views dispose of this case, for the grant in controversy was the sole act of the Assembly, and has not even the element of the governor's recommendation in its favor.

But if it were otherwise, and the cession were the act of the governor, it would still be invalid, because it would violate the fundamental rule on which the right of donation was placed by the law. The essential element of colonization is wanting, and, besides, the number of acres granted was enormously in excess of the maximum quantity grantable under the law. The decrees of the Cortes of Spain are invoked as an authority for this grant, but it is sufficient to say, that they were invoked for a similar purpose in Vallejo's case,* and were decided to be inapplicable to the state of things existing in Mexico after the revolution of 1820. And the organic bases of the Mexican republic of June 13th, 1843, are equally ineffectual to support this grant. If it be conceded the powers of the Departmental Assembly were enlarged by these decrees, so far as the private property belonging to the department, as a municipal organization, is

* 1 Black, 541.

concerned, yet they effected no change in the mode of disposing of the public lands, nor was the colonization policy of 1824, at all altered by them, for they expressly declare that "in alienations of lands, the existing laws will be observed and what the colonization laws determine."

In any aspect of this case, the claim for this large tract of land has no foundation to rest upon. The Departmental Assembly, aided in a certain sense by the governor, usurped the prerogative of the supreme government, and no ingenuity of reasoning can sanction a proceeding, which was not only without authority of law, but contrary to the forms prescribed by it.

JUDGMENT REVERSED, and the cause remanded to the court below, with directions to enter a decree

DISMISSING THE PETITION.

TUCKER *v.* SPALDING.

1. In an action at law, where a patent of prior date is offered in evidence as covering the invention described in the plaintiff's patent, on a charge of infringement, the question of the identity of the two instruments or machines, must be left to the jury, if there is so much resemblance as raises the question at all.
2. It is no ground for rejecting the prior patent that it does not profess to do the same things that the second patent does.
3. If what it performs is essentially the same, and its structure and action suggest to the mind of an ordinarily skilful mechanic its adaptation to the same use as the second patent, by the same means, this adaptation is not a new invention, and is not patentable.

ERROR to the Circuit Court for the District of California.

Spalding brought an action at law against Tucker, to recover damages for the infringement of a patent for the use of movable teeth in saws and saw-plates.

The plaintiff's patent claimed the forming of recesses or sockets in saws or saw-plates for detachable or removable